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BY OVERNIGHT MAIL

May 3, 2007

Mr. Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
United States of America
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

**Re: FedEx Home Delivery
Case No. 34-RC-2205**

Dear Mr. Heltzer:

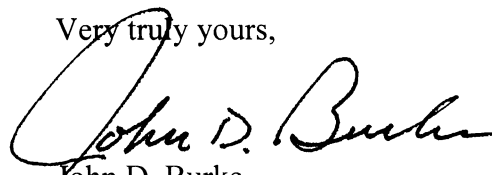
Enclosed please find nine (9) copies of the Petitioner, International Brotherhood of Teamsters, Local Union No. 671's Opposition to FedEx Home Delivery's Request for Review, in the above-entitled matter. Please note that the Opposition was filed electronically today via the Board's electronic filing system.

All parties have been served with this Opposition by Overnight Mail.

If you have any questions, please contact me.

Thank you.

Very truly yours,



John D. Burke

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CASE NO. 34-RC-2205

**FEDEX HOME DELIVERY, A SEPARARE OPERATING DIVISION OF FEDEX
GROUND PACKAGE SYSTEM, INC.,**

Employer,

and

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 671,**

Petitioner.

**PETITIONER'S OPPOSITION TO REQUEST FOR REVIEW
BY FEDEX HOME DELIVERY**

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May 3, 2007

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

FEDEX HOME DELIVERY, an operating division
Of FEDEX GROUND PACKAGE SYSTEMS, INC.,
Employer

And

CASE NO.
34-RC-2205

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 671,
Petitioner

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 671'S
OPPOSITION TO FEDEX HOME DELIVERY'S REQUEST FOR REVIEW**

PROCEDURAL BACKGROUND

The instant matter arose out of a representation petition filed by International Brotherhood of Teamsters, Local Union No. 671 ("Local 671" or the "Union") seeking to represent certain individuals who perform services for FedEx Home Delivery ("FHD" or the "Employer") in relation to a FHD facility located at 758 Rainbow Road, Windsor, Connecticut (known as the "Hartford Terminal"). Specifically, Local 671 seeks to represent individuals who are referred to by FHD as "Contractors" and who provide the home package delivery service for FHD in the territories covered by FHD's Hartford Terminal.¹ FHD opposed the Union's petition, arguing that the individuals who are the subject of the Union's petitions are independent contractors and not "employees" within the meaning of the Act.

¹ The Union does not seek to represent so-called "company" or "terminal temp drivers" or the "supplemental drivers" who are used by certain Contractors, principally during the Christmas "peak" season, to assist in delivery in the Contractors' zones; and the Employer does not contend that an appropriate bargaining unit must include those temporary company drivers or the supplemental drivers. Further, the Union does not seek to represent (1) the second and third route drivers who perform services on routes assigned to Roger Jones and Keith Ignasiak, (2) the driver who services the route assigned to Ernest Baldwin nor (3) Jones, Ignasiak and Baldwin. The Union, however, does seek to represent Paul Chiappa, who FHD contends in the alternative is a supervisor, as well as Robert Dizinno, who FHD also would exclude on "community of interest" grounds.

On February 26 through March 2, 2007, a hearing relative to the Union's petition was held in Hartford, Connecticut. At the outset of the hearing, the parties agreed to incorporate the record in similar cases from Region 1 that involved two terminals located in Wilmington, Massachusetts (1-RC-22034, 22035). By so agreeing, the parties also incorporated the records from related FedEx cases from Region 1 (1-RC-21966 – Northboro, Massachusetts Terminal), Region 4 (4-RC-20974 – Barrington, New Jersey Terminal) and Region 22 (22-RC-12508 – Fairfield, New Jersey Terminal. *See* Decision and Direction of Election (“DDE”), 1-RC-22034, 22035, at 5 (September 20, 2006).

In regards to the Northboro Terminal, the Regional Director in her DDE, dated January 24, 2006, ruled that the Contractors who operated routes out of the Northboro Terminal were/are employees within the meaning of the Act and that the following employees constitute a unit appropriate for collective bargaining:

All full-time and part-time contractors employed by the Employer at its Northboro, Massachusetts facility, but excluding temporary drivers, drivers and helpers employed by contractors, package handlers, guards, and supervisors as defined in the Act.

In 1-RC-21966, FHD, subsequently, filed a request for review with the Board, challenging certain evidentiary rulings of the Hearing Officer that had been upheld by the Regional Director in her DDE, *i.e.* (1) the Hearing Officer's decision to incorporate the Region 4 and Region 22 FedEx decisions into the record in 1-RC-21966 and his corresponding ruling that the facts developed in those two decisions would be considered the facts as developed in 1-RC-21966 unless such facts were distinguished through litigation of the independent contractor issue in 1-RC-21966; (2) the Hearing Officer's refusal to admit into evidence the transcripts from the Region 4 and Region 22 hearings; and (3) the Hearing Officer's refusal to allow evidence of route sales that had occurred at the two New Jersey

terminals since the closing of the records in those two cases. In its request for review in 1-RC-21966, FHD also challenged the Regional Director's ultimate, substantive conclusion that the Contractors servicing routes out of the Northboro Terminal are "employees" within the meaning of the Act.

In an Order dated March 23, 2006, the Board ruled, *inter alia*, (1) that "the Regional Director properly affirmed the hearing officer's decision to incorporate the ... Region 22 and Region 4 *FedEx* decisions into the record, and to consider the facts as developed in [those] cases as facts applicable to the instant case, unless such facts were distinguished through litigation of these matters in the instant case;" (2) that the Regional Director, nevertheless, had "erred by affirming the hearing officer's refusal to admit the transcript from the prior *FedEx* cases;"² (3) that the Regional Director also had erred "in affirming the hearing officer's ruling refusing to allow evidence of route sales that [had] occurred in the locations involved in the [Region 4 and Region 22 matters] since the closing of the records in those case" but that this error did not affect the ultimate holding in that the Regional Director correctly had "limited her consideration of evidence of route sales to the Worcester facility;" and (4) that, in all further respects, including FHD's challenge to the Regional Director's determination that the contractors were/are employees within the meaning of the Act, FHD's Request for Review was denied.

In regards to the two Wilmington, Massachusetts terminals, the Regional Director, in her DDE dated September 20, 2006, ruled, once again, that the FHD Contractors, who in those instances operated routes out of the two Wilmington, Massachusetts Terminals were/are employees within the meaning of the Act. In so ruling, the Regional Director relied on the

² The Board, however, did not find that this error required a remand to the Regional Director for her to reconsider her decision.

following findings that are quoted, at length, and that are applicable equally to the instant case:

As in *Roadway III*, all the FedEx Home contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages. Although they have the option to incorporate as a business, all contractors must do business in the name of FedEx Home. In this regard, wearing FedEx Home-approved uniforms and badges, all contractors operate vehicles that must meet FedEx Home specifications and uniformly display the FedEx Home name, logo, and colors.

As noted in the Region 4 Decision, while the logos, uniforms, and badges are to some extent designed to comply with DOT regulations, they are also an important component of FedEx Home's nationwide effort to market its brand name, and the logos are larger than required by DOT regulations. No prior delivery training or experience is required, and FedEx Home will train those with no experience. "Thus the drivers' connection to and integration in [the Company's] operations is highly visible and well publicized." *Roadway III*.

As in *Roadway III* and the prior FedEx Home cases, contractors are not permitted to use their vehicles for other purposes while providing service for FedEx Home. The contractors have a contractual right to use their FedEx Home trucks in business activity outside their relationship with FedEx Home during off-hours, provided they remove all FedEx Home markings, but only one former multiple route contractor at Jewel Drive and no current contractors at either Wilmington terminal have ever done so.

I find, as did the Board in *Roadway III*, that "[t]his lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by the ...drivers and more a matter of the obstacles created by their relationship with [the Company.]" Thus, the contractors' contractual right to engage in outside business falls within the category of "entrepreneurial opportunities that they cannot realistically take," because the contractors' work schedules prevent them from taking on additional business during their off-hours during the workweek. *Roadway III*.

As in *Roadway III* and the prior FedEx Home cases, Fed Ex Home exercises substantial control over all the contractors' performance of their functions. FedEx Home offers what is essentially a take-it-or-leave-it agreement. While all contractors may negotiate with their terminal manager over what towns will be included in their primary service area, FedEx Home retains the right to reconfigure the service area unilaterally.

All contractors must furnish a FedEx Home-approved vehicle and FedEx Home-approved driver daily from Tuesday through Saturday; they do not have the discretion not to provide delivery service on a given day. While all contractors control their starting times and take breaks when they wish, their control over their work schedule

is circumscribed by the requirement that all packages be delivered on the day of assignment.

FedEx Home requires all contractors to scan all packages at the start of the workday and before delivery. While use of the scanners allows the contractors to comply with DOT regulations requiring that drivers log their hours, it also allows FedEx Home to provide its customers with a package tracking service. FedEx Home also requires all contractors to deliver packages to empty residences in the manner prescribed by the Driver Release Program guidelines.

All contractors must follow FedEx Home's guidelines for safe driving. FedEx Home gives bonuses tied to compliance with its guidelines, giving it a further measure of control over contractor performance. The Operating Agreement requires all contractors to buy insurance in types and amounts specified by FedEx Home, including even insurance for damages contractors may incur while operating their vehicles for their personal benefit.

As in *Roadway III* and the prior FedEx Home cases, FedEx Home provides support to all its contractors in various ways that are inconsistent with independent contractor status. FedEx Home refers contractors to dealers from which they may lease or purchase the FedEx Home-approved vehicles and to lenders willing to finance such purchases. It refers contractors to other contractors who may wish to sell their used FedEx Home vehicles, thus "easing a new driver's responsibility for obtaining a qualified vehicle" and "increasing the likelihood that there will be a qualified buyer for a costly specialty vehicle no longer needed" by a contractor. *Roadway III*.

FedEx Home provides extensive support to contractors by offering the Business Support Package and arranging for the required insurance, thus providing an array of required goods and services that would be far more difficult for contractors to arrange on their own. As in *Roadway III* and the prior FedEx Home cases, contractors are certainly free to purchase these required goods and services elsewhere, but there is no evidence that any Wilmington contractor has purchased these items elsewhere, suggesting that the right is not meaningful.

FedEx Home also offers to arrange for approved substitute drivers for its contractors by virtue of the Time Off Program. FedEx Home provides contractors who maintain sufficient vehicle maintenance accounts with \$100 per accounting period to help defray repair costs. FedEx Home requires contractors to permit FedEx Home to pay certain vehicle-related taxes and fees on their behalf and to have the payments deducted from their settlement.

The contractors' compensation package also supports employee status. With the exception of the right to appeal changes in core zone density payments, FedEx Home unilaterally establishes the rates of compensation for all contractors. As in *Roadway III*, there is little room for the contractors to influence their income through their own efforts or ingenuity, as their terminal manager determines, for the most part, how

many deliveries they will make each day; there is no evidence that a refusal or willingness to deliver “flexed” packages has significantly altered any contractor’s income.

A contractor’s territory may be unilaterally reconfigured by FedEx Home. FedEx Home tries to insulate its contractors from loss to some degree by means of the vehicle availability payment, which they receive just for showing up, and the temporary core zone density payment, both of which payments guarantee contractors an income level predetermined by FedEx Home, irrespective of the contractors’ personal initiative. FedEx Home also shields drivers from loss due to substantial increases in fuel prices by means of the fuel/mileage settlement.

As in *Roadway III* and the prior FedEx Home cases, the contractors at the Wilmington terminals have the contractual right to sell their routes, but the contractors may sell only to buyers who are acceptable to FedEx Home as qualified and who are willing to enter into an agreement with FedEx Home on substantially the same terms.

In *Roadway III*, the Board found that evidence of a few such sales, some of which were forced by Roadway, were insufficient to support a finding of independent contractor status, particularly since it was unclear from the record whether any driver had profited materially from a sale.

Here, there is no evidence that any Ballardvale contractor has ever sold a route. There have been only two route sales at Jewel Drive, but the sales were combined with the sale of a truck, which makes the portion attributable to the route murky.

In one case, contractor Brian Neal sold a route for which he paid nothing, along with a truck whose value he estimated at \$12,000 to \$15,000, for a total of \$18,000, and paid a \$1000 fee to a broker. Thus, Neal’s profit on the sale of his route was only \$3000 to \$6000. In the case of the second route sale, Aquinaldo Ferreira paid Timothy Jung \$10,000 cash and agreed to take over the \$26,000 debt on his truck. After deducting the value of the truck, which Jung estimated at between \$20,000 to \$25,000, it appears that, at best, Ferreira paid Jung somewhere between \$11,000 to \$16,000 for the route.

There is evidence that FedEx Home gave routes to other contractors at the two Wilmington terminals for free. There is also evidence that Jung abandoned his second route without selling it, that contractor Diane Desantis abandoned two routes without selling them, and it appears that contractor Juan Valasquez abandoned his two routes without selling them, as well. In these circumstances, I find the evidence of only two route sales too insubstantial to support a finding of independent contractor status. DDE, at 38-43 (footnotes omitted).

In 1-RC-22034 and 1-RC-22035, FHD again filed a request for review with the Board, challenging the preliminary ruling of the Regional Director that, on the issue of

entrepreneurial activities, she would limit her “consideration of such evidence to route sales and other entrepreneurial activity at the Wilmington, Massachusetts facilities” (DDE, at 6) and the Regional Director’s ultimate conclusion that the Wilmington Contractors were/are employees within the meaning of the Act. In a subsequent Order dated November 8, 2006, the Board denied FHD’s request for review “as it raises no substantial issues warranting review.”

In sum, like the Regional Directors in 1-RC-21966, 4-RC-20974, 22-RC-12508, and 1-RC-22034 & 22035, on April 11, 2007, the Regional Director in the instant matter found that the subject employees were not independent contractors under the Act and ruled that the Contractors employed at the FHD Hartford Terminal constituted a unit appropriate for the purposes of collective bargaining.

ARGUMENT

Pursuant to the Board’s Rules, Section 102.67(c), the Board will grant a request for review only where compelling reasons exist. In this regard, the party seeking review must demonstrate that:

- (1) a substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent; or
- (2) the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; or
- (3) the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
- (4) there are compelling reasons for reconsideration of an important Board rule or policy. 29 U.S.C. §102.67(c)(1)-(3).

In its request for review, FHD fails to articulate any basis under the Board’s rules supporting its request for review. Instead, FHD seeks *de novo* review of the Regional Director’s decision by the Board. As detailed below, none of FHD’s arguments have merit.

A. The Regional Director Did Not Err In Ruling That The FHD Contractors Are “Employees” Within The Meaning of the Act.

The primary issue in dispute in this matter is whether the Contractors are “employees” within the meaning of the Act (as asserted by the Union) or “independent contractors” (as argued by FHD). FHD bears the burden of proof on this issue. *See, e.g., BKN, Inc.*, 333 NLRB 143, 144 (2001). There is considerable Board precedent on the central issue in this matter – all of which is contrary to FHD’s position in this case. *See, e.g., Roadway Package System*, 326 NLRB 842 (1998); *FedEx Ground Package System, Inc., d/b/a FedEx Home Delivery*, Case 4-RC-20974 (June 1, 2005); *FedEx Ground Package System, Inc.*, 22-RC-12508 (November 2, 2004); *FedEx Home Delivery, A Separate Operating Division FedEx of Ground Package System, Inc.*, 1-RC-21966 (March 23, 2006); and *FedEx Home Delivery, A Separate Operating Division FedEx of Ground Package System, Inc.*, 1-RC-22034 & 22035 (November 8, 2006). In this regard, the Regional Director in the instant matter noted the following:

On three separate occasions prior to the Employer’s acquisition of Roadway Package Systems in 1998, the Board considered whether contractor drivers employed by Roadway were independent contractors or employees within the meaning of the Act. In each case, the Board found that the drivers were employees. *See Roadway Package Systems (Roadway I)*, 288 NLRB 196 (1988); *Roadway Package Systems (Roadway II)*, 292 NLRB 376 (1989), *enfd.* 902 F.2d 34 (6th Cir. 1990); and *Roadway Package Systems (Roadway III)*, 326 NLRB 842 (1998). In addition, as noted above, on four occasions since the Employer’s acquisition of Roadway, the Board has affirmed Regional Director determinations that contract drivers employed by the Employer at either its Home or Ground operations are not independent contractors and are statutory employees. DDE, at 24.

As found by the Regional Director and as detailed below, there is nothing in the instant record that would suggest that the Regional Director erred in finding that the Contractors assigned to the Hartford Terminal are any less “employees” than the Contractors considered in the above-referenced cases. Indeed, a strong argument can be made that the

Contractors who are assigned to the Hartford Terminal are more clearly “employees” than the Contractors involved in the prior *Roadway* and *FedEx* Board cases.

In this regard, the United States Supreme Court has held that the “obvious purpose of [the Taft-Harley Act] was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.” *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). Those general agency principles are set out in the Restatement (Second) of Agency, Section 220, pp. 485-486 (1958), which, in relevant part, states as follows regarding the definition of a “servant,” *i.e.* an “employee”:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right of control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered;
 - (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
 - (b) Whether or not the one employed is engaged in a distinct occupation or business.
 - (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
 - (d) The skill required in the particular occupation.
 - (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
 - (f) The length of time for which the person is employed.
 - (g) The method of payment, whether by the time or by the job.
 - (h) Whether or not the work is part of the regular business of the employer.
 - (i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in the business.

In *Roadway III*, the Board “rejected the argument that the predominant factor in this analysis is whether an employer has a ‘right to control’ the manner and means of the work performed by the individual whose status is at issue. Instead, the Board cautioned that the Restatement factors are not exclusive or exhaustive, and that, in applying the common-law agency test, it would consider ‘all the incidents of the individual’s relationship to the employing entity.’” *Slay Transportation*, 331 NLRB 1292, 1293 (2000), *quoting in part, Roadway III, supra* at 850.

In particular relevance to the case at hand, the Board, in *Roadway III, supra* at 851, focused on the following factors/considerations in concluding that the Contractors were employees and not independent contractors:

As in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company’s normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company’s name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company’s business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All these factors weigh heavily in favor of employee status, and are fully supported by the following facts.³

The Board has highlighted similar factors in other cases involving the same issue. For example, in *Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), *enf’d*. 292 F.3d 777 (D.C. Cir. 2002), the Board stated as follows:

³ In *BKN, Inc.*, 333 NLRB at 144, the Board, in reference to the Board’s analysis and holding in *Roadway III, supra*, stated as follows regarding the most significant factors in finding the Contractors to be employees: “Thus, no single factor is controlling in making this determination. For example, in *Roadway*, the Board found that the drivers in dispute were employees based on the following factors: (i) the drivers did not operate independent businesses, but rather performed functions that were an essential part of one company’s normal operations; (ii) they constituted an integral part of the company’s business under its substantial control; (iii) they had no substantial proprietary interest; and (iv) they had no significant entrepreneurial opportunity for gain or loss.”

We agree with the judge that the record establishes that the Respondent's owner-operators are employees within the meaning of Section 2(3). Thus, the owner-operators perform work which is substantially the same as that of employee drivers and constitutes the essential functions of the Respondent's normal operations as a package pickup and delivery service. They work full time, are trained by the Respondent and need not have prior experience, and they do business in the Respondent's name with substantial guidance from and control of the Respondent. Although owner-operators must obtain and use their own vehicles, they are not permitted to use their vehicles to make deliveries for anyone other than the Respondent. Owner-operators purchase their insurance through a company designated by the Respondent. They are required to display the Respondent's logo on their vehicles and to wear certain color trousers, shirts, and shoes, if they opt not to wear uniforms. They have no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss. The routes, the base pay, and the amount of freight to be delivered daily on each route are determined by the Respondent, and owner-operators have no right to add or reject customers. Finally, the Respondent incurs no liability for unilaterally terminating an owner-operator's contract.

Much of the evidentiary foundation for the Regional Director's ultimate conclusion in 1-RC-22034 & 22035 (as well as her earlier conclusion in 1-RC-21966) flowed directly or indirectly from the terms of the Operating Agreement. In the instant matter, the Employer's Contractor Relations Manager, David Durette (hereinafter, "Durette"), testified that the substantive terms of the Operating Agreement have remained fundamentally unchanged since 2000 and that those substantive terms are enforced as written at the Hartford Terminal. Tr. 278-279.⁴ As detailed below, the facts relied upon by the Regional Director in finding employee status in 1-RC-22034 & 22035 are equally present in the instant case. Moreover, the instant record is more compelling in favor of employee status than the records in either 1-RC-22034 & 22035 or 1-RC-21966.

1. The Contractors assigned to the Hartford Terminal are "employees" within the meaning of the Act.

Despite the Board's repeated rejection of FHD's contention that Contractors under the Operating Agreement are independent contractors, it nevertheless makes the same argument

⁴ References to the Region 34 Transcript are cited as Tr. ____.

in the instant matter.⁵ First, FHD requested review of all four of the above-cited DDEs arguing that the Contractors were “independent contractors” under the Act. The Board, in all four requests for review, rejected FHD’s contention that the Contractors were “independent contractors.”

Second, FHD argues that the Regional Director’s failed to distinguish the Board’s decision in *Argix Direct, Inc.*, 343 N.L.R.B. 1017 (2004). *See* Request for Review, at 31. Significantly, FHD made the same argument in its Request for Review in 1-RC-21966 - that argument was rejected by the Board. In stark contrast to the facts of the instant matter, as set forth in detail below, the Board in *Argix* expressly relied on the following the facts:

1. “The Employer does not require that the trucks be of any particular make, model, or color, and owner-operators are not restricted from placing their names on the trucks. In fact, a majority of the owner-operators have their own names, addresses, and/or logos emblazoned on their trucks. The only identification that the Employer requires the owner-operators to place on their trucks is a small, DOT-required sign with the Employer's name and DOT number.”
2. “Five of the Ridgefield owner-operators own 20 of the approximately 63 trucks that operate out of the Ridgefield facility. Some of these owner-operators drive one of their own trucks, while others elect not to do so.”
3. “Owner-operators are not assigned specific routes. Rather, they are generally assigned to deliver in general geographic areas, such as Manhattan or Queens.”
4. “Owner-operators are free to elect not to work for the Employer on any particular day without penalty, provided that the owner-operator has not previously advised the Employer that he would be available at such time.”
5. “During most of the year, there are not enough deliveries out of the Ridgefield facility to provide routes for all owner-operators each day. The number of routes available also varies from day-to-day within the week, with Monday and Tuesday being the busiest days and Thursday the slowest. Thus, for most of the year owner-operators drive for the Employer fewer than 5 days a week.”

⁵ In this regard, FHD argues that the legislative history of the Act relating to “independent contractors” supports its contention. FHD did not raise this argument before the Regional Director and, as such, the argument should be stricken in accordance with the Board’s rules, Section 102.67(d). *See* Request for Review, at 12-13.

6. “Under the operating agreement, owner-operators specifically reserve the right to provide services for other carriers, and nothing in the agreement prohibits owner-operators from using their trucks for personal or other business use. The record reflects that at least two owner-operators have curtailed their services for the Employer in order to work elsewhere one day a week.”
7. “[T]he Employer places no restriction on the use of the trucks for purposes other than delivering for the Employer and, in fact, its agreement with each owner-operator specifies that the owner-operator reserves the right to provide services for other carriers.”
8. “Owner-operators have discretion over their work schedules”
9. “Owner-operators are not penalized in any manner for electing not to work, so long as they have not previously agreed to work on a given day.”⁶

In the instant matter, as discussed below, an analysis of the significant factors that were identified in *Roadway III* and subsequent related Board decisions, including the recently affirmed DDE’s in 1-RC-22034 and 22035 involving New England based FHD operations, point at least as strongly to a conclusion that the Contractors assigned to the Hartford Terminal are “employees” within the meaning of the Act.

(i) Contractors at the Hartford Terminal do not operate independent businesses, but rather perform functions that are an essential part of FHD’s normal operation in the Hartford area.

FHD is in the business of package delivery and the Contractors deliver the packages on a daily basis and are required to do so in a manner “that can be identified as being part of the FHD system.” See Company Exhibit 4, Operating Agreement, “Background Statement.”⁷

⁶ FHD fairs no better under *Dial-A-Mattress*, 326 N.L.R.B. 884 (1998). In *Dial-A-Mattress*, the owner-operators were not required to make their vehicle available on days scheduled; the company played no role in the selection, acquisition or inspection of the owner-operators’ vehicles; there was no requirement as to the type, model, size or condition of the vehicle; the owner-operators were not required to wear uniforms; the owner-operators were not required to display the company’s advertising on the vehicles; there was no minimum guaranteed pay; the company did not provide job training; the owner-operators displayed their own company’s name, address, and DOT number on their individual trucks; and there was no disciplinary procedure. See also DDE, at 29-30.

⁷ The Operating Agreement, Company Exhibit 4, was an agreed upon exhibit contained in the record of the similar cases from Region 1 that involved two terminals located in Wilmington, Massachusetts (1-RC-22034, 22035) and will be referred throughout this Opposition as the “Operating Agreement.”

As such, the Contractors perform the very services for which FHD's customers pay. Moreover, Contractors are prohibited from using their vehicles for other purposes while providing service for FHD. Tr. 608. *See Operating Agreement*, §1.4 ("While the Equipment is in the service of FHD, its shall be used by Contractor exclusively for the carriage of goods for FHD, and for no other purpose.").

Significantly, Contractors are banned from entering into agreements with other package carriers. Tr. 438. While Contractors, theoretically, are able to engage in outside pursuits on their own time, their ability to do so is constrained by the fact that they must spend five full days a week, Tuesday through Saturday, working for FHD and are required to conceal the FHD logo on their vehicles if they work elsewhere. *See Operating Agreement*, §1.5.⁸ *See Roadway III, supra* at 852 (the requirement that a driver must show up for work each day to fulfill his contract obligations - as opposed to deciding not to work on any particular day – demonstrates employee status).

In fact, none of the Contractors associated with the Hartford Terminal operate any form of independent business from FHD or use their vehicles for commercial purposes other than for FHD. Tr. 179, 295, 527, 607, 608 & 885. It is plain that the time constraints placed on the Contractors as well as the prohibition imposed on other work by FHD renders the ability to engage in outside pursuits illusory.

(ii) Contractors do not need significant prior training or experience.

Anyone can become a Contractor so long as he/she is over 21, has a good driving record and no criminal convictions; can work a Tuesday through Saturday schedule; and can pass a physical and drug test. Tr. 164-165, 201, 595, 614-615 & 668-675; *see also Operating*

⁸ Section 1.5 requires, in part, that the Contractor "mark Equipment while in FHD's service with such identifying colors, logos, numbers, marks and insignia ... or to identify the Equipment as a part of the FHD system."

Agreement, FHD “Safe Driving Program.” FHD conducts a training course (“QPDL” or “Quality P & D Learning”) to teach prospective Contractors, who do not have at least one year of commercial driving experience, how to perform package delivery work and safe driving. Tr.165, 354 & 355. The training consists of 5-9 days of classroom and driver safety school including testing. Tr. 584, 615-616, 673, 893 & 1022. FHD also pays the Contractors for time spent in the driver training course, suggesting that the training is the initial phase of a Contractor’s employment and not a prerequisite to being hired. Tr. 583.

Nearly all Contractors initially are hired as temporary drivers. Tr. 59-60, 164-165, 391, 395, 443-444, 522-523, 585, 614, 675, 892, 938-939, 1055, 1056-1057 & 1058. Temporary drivers start as employees of FHD although they are paid directly through a temp agency, currently, Kelly Services. As noted above, prospective drivers are paid while being trained. Tr. 391, 395, 443, 583-584, 615, 616, 671, 892-893, 917, 938-939, 1022, 1057, 1085-1086 & 1090. Temporary drivers must complete FHD training (Tr. 284 & 355-356) and they may be terminated for failing to meet FHD standards. Tr. 282. FHD, following training, issues the new drivers a FHD certification card. Tr. 525-526. Temporary drivers are employees of FHD.

After the completion of FHD training, temporary drivers perform package delivery services for FHD for varying periods of time before being offered the opportunity to become a Contractor. Tr. 59-60, 444-446, 522-523, 586, 616-617, 673 & 1022. Temporary drivers who meet FHD standards sign Operating Agreements with Addendums identifying their primary service areas/proprietary zip codes. Tr. 169 & 171. FHD, however, retains the right to reconfigure the services area unilaterally. *See* Operating Agreement, §6.2. *See Roadway III*,

supra at 853 (the ability of the employer to unilaterally reconfigure a driver's primary service area is a factor in determining employee status).

The Operating Agreement is offered on a take-it-or-leave-it basis and may not be altered by the Contractor. Tr. 176.

(iii) *Contractors conduct business in FHD's name.*

All Contractors, in the performance of their duties, must be "identified as being part of the FHD system." *See* Operating Agreement, "Background Statement." All Contractors must purchase and wear FHD uniforms and must present themselves to the public, in general, and customers, in particular, as being part of FHD, while performing pick-up and delivery. In this regard, FHD requires that that Contractors

will wear an FHD-approved uniform, maintained in good condition, and will otherwise keep his/her personal appearance consistent with reasonable standards of good order as maintained by Competitors and promulgated from time to time by FHD. In addition, the Equipment shall be maintained in a clean and presentable fashion free of body damage and extraneous markings, in accordance with the standards of the industry.

See Operating Agreement, §1.1. In addition, as set forth in detail below, the vehicles that are acquired by Contractors through FHD must be white and bear permanent FHD decals, while supplemental or rental vehicles are marked using magnetic decals. Tr. 333-334 & 942.

Significantly, FHD's first witness, Roger Jones ("Jones"), a multi-route Contractor, testified that the public does not recognize him as an independent contractor. Tr. 140.

Despite these facts, FHD complains that the Regional Director erred in considering DOT Regulations as evidence that FHD controls the Contractor's work. *See* Request for Review, at 16. FHD misconstrues the Regional Director's decision. In this regard, the Regional Director correctly held that,

Although the logos, uniforms and badges are to some extent designed to comply with DOT regulations, they are larger than required by DOT regulations, and they are also an important component of the Employer's nationwide effort to market its brand name. DDE, at 25.

Thus, to the extent that certain DOT regulations apply to FHD, the Regional Director properly considered the dual nature of the evidence as not solely related to DOT regulations.⁹ Indeed, the same conclusions were reached by the Regional Directors in 4-RC-20974 and 1-RC-21966. Moreover, FHD made much the same argument about the impact of the DOT regulations to the Board in its requests for review in 4-RC-20974 and 1-RC-21966, both of which were denied. There is no reason for departing from those decisions. Finally, the Board in *Roadway I*, 288 NLRB at 198, found that a requirement that drivers display the employer's logo on their trucks is evidence of the employer's control over the daily regimen of the owner-operators.

(iv) *Contractor start and stop times are controlled by FHD.*

FHD's delivery requirements and the Operating Agreement control the Contractors' work start and stop times. Tr. 410-411. *See* also Operating Agreement, §1.10 (requiring that "FHD has represented to shippers and consignees that in arranging transportation of packages within the FHD system, it will provide a standard of service that is fully competitive with that offered by other national participants in the industry").

The process of package delivery begins with the arrival of two FedEx Ground trailers from New Jersey at the Hartford Terminal. Tr. 374-375. The first trailer arrives at 4:00 a.m. and the second trailer arrives between 6:00 a.m. and 6:30 a.m. Tr. 375. FHD package handlers sort the packages from the trailers between 4:30 a.m. and approximately 7:00 a.m. Tr. 376. The package handlers scan each package and the packages are assembled on pallets

⁹Absent from the request for review is any citation to any DOT regulation in support of this claim.

and placed in a location where they can be easily loaded onto FHD Contractor vehicles. Tr. 376-378.

The majority of Contractors arrive at the terminal between 6:00 a.m. and 7:00 a.m. Tr. 595-596, 597, 630, 677, 882, 1007, 1010 & 1093. When Contractors arrive at the terminal, packages have been staged for them on pallets. Tr. 630. Contractors are required to begin the day by loading their vehicles.¹⁰ Tr. 629, 633 & 1008.

Each Contractor is equipped with a FHD “scanner” that is part of the FHD “Business Support Package.” Before Contractors receive their packages for loading, the scanners contain information for the day, including the number of packages at start time. Tr. 633. Prior to loading, Contractors scan each package.¹¹ Tr. 633. Contractors are instructed by FHD to enter their on-duty time in the scanner when they begin loading. Tr. 944 & 945.

Once all packages have been scanned and loaded, Contractors enter the terminal office and FHD management closes the routes by resetting the Contractors’ scanners. Tr. 633, 635, 648-649, 651 & 652. After closing the route, FHD management provides each Contractor with a route manifest and a “turn-by-turn” (also referred to as a “Vehicle Routing Program”)(Tr. 136) listing the Contractor’s stops and delivery sequence for the day. Tr. 632-633 & 635. Contractors cannot leave the terminal until their scanners are reset and a route manifest is generated.¹² Tr. 635-637, 648-649 & 651. Contractors cannot close their own

¹⁰ FHD falsely claims that it does not control the number of packages a particular driver delivers on a particular day. *See* Request for Review, at 23. To the contrary, FHD management assigns each contractor packages as they deem necessary and those predetermined packages are already set on pallets when the Contractors arrive at work each day.

¹¹ When a scanner is broken, FHD replaces it immediately. Tr. 646.

¹² In the past four years, only two Contractors have dispatched before the trailers were unloaded. Tr. 407.

routes or reset their scanners. Tr. 635-636, 637, 651 & 652. FHD, thus, controls the start times of all Contractors.

Most Contractors leave the terminal between approximately 8:00 a.m. and 8:30 to begin their package runs. Tr. 596, 677 & 1010. According to the present Hartford Terminal Manager, Scott Hagar (“Hagar”), Contractors leave the terminal based on when the trailers are unloaded and the Contractors’ vehicles are loaded. Tr. 408 & 417.

FHD requires that Contractors deliver all packages assigned to their route during the day. Tr. 629-630. The identification of individuals that signed for packages as well as the location of released packages (left in accordance with the FHD “Package Release Program”) are captured by Contractor scanners. Tr. 640. Package delivery information is transmitted immediately to FHD through the scanner and FHD has access to this information throughout the day. Tr. 640-641. Scanners also capture the hours worked by Contractors. Tr. 944. FHD has made it clear to Contractors that all packages are to be delivered by 8:00 p.m.¹³ Tr. 631-632. Contractors also enter their off-duty time into the scanners. Tr. 944.

As previously stated, the scanners capture the hours worked by each Contractor as well as each Contractor’s start time and off-duty time. Tr. 944-945. Based on the information captured by the scanners, a “Daily Hours Report” is generated by FHD. Tr. 944. The report is reviewed on a daily basis by FHD management at the Hartford Terminal.¹⁴ Tr. 944. The hours report is also reviewed by FHD’s Regional Safety and Maintenance Director. Tr. 944 & 947.

¹³ Moreover, FHD sets a target on the number of stops that can be accomplished in 9.1 hours. Tr. 213.

¹⁴ Hartford Terminal Manager Hagar reviewed the reports on a daily basis to determine whether any of the Hartford-based Contractors were failing to provide proper service and, if so, whether it warranted the termination of a Contractor’s Operating Agreement. DDE, at 11.

(v) FHD requires that Contractors use certain approved vehicles.

Contractors are allowed to use only FHD approved vehicles for packages deliveries. Tr. 177, 669-670 & 684. FHD has an approved list of vehicles that is provided to Contractors at the Hartford Terminal. Tr. 684 & 685. FHD management also verbally informs Contractors as to the type of vehicles that are approved. Tr. 685. FHD, additionally, provides the Contractors with a list identifying five or six vehicle leasing companies or vendors.¹⁵ Tr. 617, 685 & 860. Most Contractors purchase their vehicles from the dealer list. Many Contractors obtain their vehicles through Bush Leasing, a company that appears on the list and has a business relationship with FHD.¹⁶ Tr. 177-178, 589, 617, 862-863, 894 & 1003. FHD recommends that Contractors use Bush Leasing. Tr. 177.

Presently, P-500 vehicles are on the approved list.¹⁷ Tr. 684. While the P-500 is acceptable without FHD approval, all other types of vehicles must be approved by FHD.¹⁸ Tr. 891, 908-909, 926, 927 & 930. By requiring such approval, FHD has established a requirement that a vehicle be of a certain size capacity. Tr. 530. Indeed, the Operating Agreement, §1.1, provides that a Contractor's vehicle is "subject to the determination of its suitability for the service called for." Regardless of the type, all new vehicles must be certified for service by FHD and Contractors must provide FHD documentation of ownership and photographs of the vehicle. Tr. 529-530.

¹⁵ Despite the repeated reference to the list by Contractors, all of whom were called as witnesses for FHD, FHD's Regional Safety and Maintenance Director, Michael Carey ("Carey"), disingenuously claimed that no such list exists. Tr. 926. Carey is the same individual that claimed that the Hearing Officer made inappropriate comments to Chiappa.

¹⁶ Contractor Garrett Anderson testified that the lease for his vehicle through Bush leasing was "like a purchase through FedEx..." Tr. 863.

¹⁷ In 2004, FHD stopped approving P-550s. Tr. 683.

¹⁸ The P-500 is the most commonly used vehicle in Hartford. Tr. 955.

In order to obtain approval for vehicles other than the P-500, Contractors must email FHD's Regional Safety and Maintenance Director and Regional Director seeking approval of the vehicle. Tr. 909-910. Contractors must explain not only why the proposed vehicle is better suited to service their routes than a P-500 but also why it is a better vehicle for them in the business of delivering packages. Tr. 909 & 929. Under all circumstances, the proposed vehicle must be capable of servicing the Contractor's service route. Since 2005, only one vehicle other than a P-500 has been approved for use at the Hartford Terminal.¹⁹ Tr. 934. For example, a new Contractor, Ilir Dishnica (hereinafter, "Dishnica") was informed by FHD management that the vehicle he sought to purchase was not large enough. Tr. 1002. As a result, Dishnica purchased a P-500, which was acquired for him by FHD through Bush Leasing. Tr. 1023.

Nevertheless, FHD contends that the Regional Director's finding that the Contractors lease or own their vehicles is at odds with his conclusion that FHD supplies Contractors with the necessary instrumentalities and tools of their work. *See* Request for Review, at 29. FHD's argument misses the mark. In this regard, it is clear that the Regional Director fully acknowledged that the Contractors lease or own their own vehicles. *See* DDE, at 27. Indeed, the Board in *Roadway III*, *supra* at 844-845, found that the drivers were employees even though they owned or leased their vehicles. FHD, however, disregards the Regional Director's explanation as to the multitude of other factors demonstrating that FHD supplies Contractors with the necessary instrumentalities and tools of their work. *See* DDE, at 27-28.

FHD also has established requirements as to the location of its logos on Contractor vehicles. Tr. 527. FHD has arranged and paid for permanent FHD decals to be applied to

¹⁹ FHD additionally requires that there be shelving within each vehicle. Tr.935.

Contractor vehicles.²⁰ Tr. 178-179 & 526-527. In addition, FHD arranged to have two vehicles delivered to the Hartford Terminal with all FHD decals in place and a roll of masking material, despite the fact that there had been no discussion between the Contractor and the leasing company (Bush Leasing) or vendor about having the vehicle lettered with the FHD logos.²¹ Tr. 607-608, 618-619 & 893-894. FHD additionally has offered to place the Contractors' names and/or d/b/a's on the vehicles at no cost. Tr. 627. *See Roadway III, supra* at 851 (required use of uniformly marked vehicles bearing the Roadway name, logo and colors are factors showing employee status).

(vi) Contractors receive significant assistance and guidance from FHD.

FHD assists Contractors in carrying out their functions in numerous ways. For example, as stated above, FHD initially directs Contractors to vehicle dealers and finance companies through which they can acquire vehicles needed to perform functions for FHD. Moreover, FHD employees sort packages for Contractors and FHD management provides route manifests and "turn-by-turns" on a daily basis that show the Contractors' stops with suggested orders and routes for delivery. FHD training materials additionally describe, in detail, preferred methods for making deliveries and safe driving techniques. *See Operating Agreement, FHD "Safe Driving Program" & "Driver Release Program."* Contractors can only use substitute drivers who have been trained and adjudged qualified by FHD and to whom FHD has issued a certification card. Tr. 524-525. FHD, additionally, maintains a list of FHD qualified drivers and Swing Contractors to cover Contractor routes. Tr. 604. FHD solicits customers and is solely responsible for arranging the deliveries made by Contractors. The

²⁰ Magnetic logos continue to be used on temporary vehicles. Tr. 333-334.

²¹ The masking material is a large piece of masking tape made to cover the FHD logos but will not remove the logos when taken off. Tr. 179 & 607-608.

guidance and assistance provided to Contractors by FHD is evidenced by the testimony of one of FHD's witnesses: "FedEx is there for you all day, for any reason that you might need them." Tr. 601.

FHD also monitors Contractor compliance with FHD's suggested mode of operation. In this regard, FHD monitors Contractor compliance through the use of "Customer Service Rides" (also known as "ride-alongs" or "road audits"). Tr. 237-238 & 361. Contractors are required to ride their route with FHD management for the purposes of FHD monitoring the proper package release procedures under the Driver Release Program, customer interaction, whether the Contractor is complying with the FHD "Driver Safety Program" and to identify particular work habits to ensure that the Contractors are engaging in proper behavior. Tr. 201-203 & 362; *see also* Operating Agreement, FHD "Safe Driving Program." FHD has the unilateral right to accompany any Contractor on his route.²² Tr. 362 & 1077-1078. The Operating Agreement, §1.13, also provides that:

In addition, qualified FHD terminal personnel may at their option visit customer locations with contractor four times annually to verify the contractor is meeting the standards of customer service provided in this agreement.

Following these rides, a report is generated by FHD and Contractors are graded. Tr. 203 & 1078. Contractors' bonuses are affected by their performance. Tr. 1082.

Contractors also are required to comply with FHD's "Driver Release Program." Tr. 201-202; *see* Operating Agreement, "Driver Release Program." Under these requirements, Contractors must follow FHD guidelines on the release of packages when there is no individual to sign for a package. Tr. 238. If a Contractor releases a package in a manner contrary to the guidelines, the Contractor is responsible for any loss or damage. Conversely, if the guidelines are followed, as determined by FHD, FHD assumes the responsibility for any

²² FHD has required the ride despite a Contractor's objection. Tr. 1077-1078.

loss or damage. Tr. 207-208. When Contractor responsibility is determined, Contractor bonuses are affected. Tr. 206-207. In relation to the Driver Release Program, FHD conducts “Driver Release Audits” to ensure that Contractors are complying with the FHD Driver Release Program. Tr. 364 & 366. FHD, in the absence of a Contractor, takes a random sampling of the stops where a Contractor releases packages to determine if the Contractor released packages out of the view of the public and in a proper location, *i.e.* in compliance with the Driver Release Program. Tr. 364 & 366-367. In effect, FHD conducts unilateral spot-checks of the Contractors’ package delivery performance.²³ Tr. 366.

On a related subject, customer complaints are directed to FHD rather than the Contractors. Tr. 204-205. Following a complaint, FHD brings the issue to the attention of the Contractor in writing as soon as the complaint is received. Tr. 205 & 639. FHD determines whether the Contractor is at fault. Tr. 207-208.

FHD’s control over Contractors is substantial. While Contractors own or lease their vehicles, FHD ensures that all vehicles used by Contractors are safe and properly maintained and FHD assists Contractors in maintaining these vehicles. For example, on two separate occasions, FHD’s Regional Safety and Maintenance Director, recently, intervened in a repair dispute between a Contractor and vehicle dealer and obtained a reduction in the repair costs. Tr. 690-691 & 904-906. FHD’s efforts clearly are beneficial to FHD as those efforts ensure that the Contractor can resume his duties in an expedient manner. Similarly, as noted above,

²³ FHD complains that the Regional Director’s ruling that FHD “exercises substantial control over the details of contract driver performance” conflicts with his finding that “[C]ontract drivers generally have the discretion to operate their routes and perform deliveries in the sequence and manner they see fit.” *See* Request for Review, at 19. FHD is attempting to mislead the Board. In this regard, FHD failed to provide the full quote to reach its desired effect. The omitted portion of the quote actually starts, “Apart from the above restrictions, ...” DDE, at 12. The restrictions referred to by the Regional Director demonstrate significant control by FHD in the manner in which Contractors are required to perform delivery services, the timing of performance, required scanning, FHD’s control over when Contractors leave the terminal, requirements under the “Package Release Program”, “Daily Delivery Reports”, “driver release audits”, and “customer service rides.” DDE, at 10-12. In sum, the Regional Director’s finding was qualified by the substantial control exerted by FHD.

Terminal Manager Rogers intervened in a Contractor's purchase of a vehicle, after informing the new Contractor that the vehicle he sought to purchase was not large enough. Tr. 1002. During the Contractor's training, Terminal Manager Rogers made all of the arrangements for the purchase of a P-500 (financed through Bush Leasing) and placed the order. Tr. 1023 & 1024.

In regard to vehicle repairs, Contractors participate in the FHD "Guaranteed Service Account." Tr. 692. Under this program, amounts are deducted from the Contractors' settlements to fund future vehicle repairs. Tr. 692. FHD provides Contractors who maintain sufficient vehicle maintenance accounts with \$100 per quarter to help defray repair costs. *See* Operating Agreement, Addendum 3, Part VII. In addition, Contractors can borrow money from FHD to make repairs on their vehicles.²⁴ Tr. 692.

Contractors also are required to provide FHD with inspection and maintenance reports on their vehicles. Tr. 406 & 470. *See also*, Operating Agreement, §1.7 (requiring that the Contractor prepare daily driver logs and daily inspection reports to be filed with FHD). FHD also pays the Contractors' operating expenses for licenses, taxes and fees as well as any direct expenses incurred by FHD in connection with such payments. *See* Operating Agreement, §1.3. These payments are deducted from the Contractors' settlements. *Id.*

On a practical level, all insurances, including vehicle liability, disability and accident insurance, are purchased by Contractors, via weekly settlement deductions, through group policies of insurance that are maintained by FHD through Protective Insurance Co. Tr. 180, 182, 516-517, 623-625 & 1024. *See also*, Operating Agreement, §3. Protective has a business relationship with FHD and provides better, more affordable rates to Contractors. Tr. 180 &

²⁴Pursuant to the Operating Agreement, Addendum 3, Article VII, FHD will also "make a loan to Contractor to fund maintenance costs in excess of the balance in the Contractor's Service Guarantee Account."

1204. *See Roadway III, supra* at 852n.40 (the opportunity to participate in group insurance rates is a factor showing employee status). FHD also provides general liability insurance to Contractors at no cost. Tr. 1203. The policy may be revoked by FHD at its discretion. Tr. 1203-1204.

Moreover, all Contractors at the Hartford Terminal participate in the FHD “Business Support Package” through which Contractors easily secure uniforms, scanners, vehicle washing services, vinyl replacement, D.O.T physicals and inspections. Tr. 209-210, 528, 625-626 & 1024; *see also* Operating Agreement, Addendum 6. While FHD argues that the availability of the “Business Support Package” is not evidence of the employer-employee relationship, a virtually identical “business support package” offered to the drivers in *Roadway III, supra* at 852, was found to “point in the direction of employee status.” *See* Request for Review, at 29.

In addition, FHD provides a “Time Off Program” through which Contractors obtain paid time off by seniority. Tr. 197, 201 & 528. *See also* Operating Agreement, Addendum 6.1. Contractors must select dates in May of each year. *Id.* Time off is arranged through FHD. Tr. 200-201. The cost for participation in the time off program is deducted from Contractors’ settlements. Tr. 199. Under the Time Off Program, FHD provides a driver to cover the Contractor’s route while he is on vacation.

FHD also conducts specialized meetings with Contractors. The FHD Terminal Manager, Contractor Relations Manager and Business Managers hold “round table” meetings with the Contractors every Friday morning. Tr. 627-628. During the meetings, FHD provides Contractors with techniques for performing better service and addresses FHD’s concerns regarding how the Contractors are doing business. Tr. 629. In addition, FHD’s Regional

Maintenance and Safety Manager visits the Hartford Terminal and spends time discussing safety and vehicle maintenance issues with Contractors. Tr. 906.

FHD also maintains a website for Contractors. Tr. 530-531. The website bears the FHD name and logos. Tr. 531. Access to the website is gained through the Contractor's FHD identification number. Tr. 531. The website contains general Contractor information, a location where Contractor vehicles may be listed for sale, a Contractor-based history of weekly compensation and the payouts made by FHD. Tr. 531.

(vii) FHD exercises substantial control over the Contractor's performance of their functions.

FHD contends that it does not exercise "substantial control over" Contractors' performance. *See* Request for Review, at 14. Contrary to this argument, FHD exclusively dictates the terms of the Operating Agreement executed by a Contractor. Tr. 176. In some, but not all, cases the Operating Agreement defines a primary service area/proprietary zip code in which Contractors will make deliveries. In this regard, the Hartford Terminal covers the Northern half of the State of Connecticut between New York and Rhode Island, to the Massachusetts border. Tr. 381. Within this area are 26 primary service areas/proprietary zip codes assigned to 21 Contractors. Tr. 381 & 417. Each Operating Agreement has an assigned primary service area. Tr. 419. However, there are significantly more than 26 zip codes in the primary service area, many of which are not proprietary. Tr. 419. These non-proprietary zip codes are moved from Contractor to Contractor by FHD management based on the needs of FHD and on the varying volume of packages to be delivered each day. Tr. 419-420. Contractors are required to deliver all packages assigned to them on a daily basis. Tr. 402 & 629-630.

FHD can change a Contractor's proprietary zip code over the Contractor's objection. Tr. 420-421. In this regard, the Operating Agreement expressly states that FHD, acting "*in its sole discretion*" shall "have the authority, upon five work days' prior written notice to Contractor, to reconfigure [a] Contractor's Primary Service Area to take account of customer service requirements." See Operating Agreement, §6.2. Furthermore, Contractor assignments are determined by FHD management on a daily basis with open routes or zip codes being moved from Contractor to Contractor by FHD management and by "flexing" packages between and among routes on a day-to-day basis to meet customer demands. Tr. 422-423 & 641.

Packages generally are flexed during the loading process.²⁵ Tr. 643-644. FHD determines whether packages should be taken away from or added to a Contractor's route. Tr. 942. Packages are assigned to the Contractor by FHD prior to the Contractor coming to work. Tr. 629-630. Contractors cannot change the number of stops assigned to them or the number of packages to be delivered by them on a particular day. Tr. 423. FHD's control over the Contractor's workload is expressly provided for in the Operating Agreement, §1.10:

Contractor agrees to (a) Provide daily delivery and pick-up service to consignees and shippers on days and at times which are compatible with their schedules and requirements within Contractor's Primary Service Area, as that term is defined in this Agreement, and in such other areas as Contractor may from time-to-time be asked to service ...

As such, FedEx controls and determines, on a day-to-day basis, a Contractor's workload.

In theory, the Operating Agreement permits Contractors to set their own work schedules and, thereby, control their starting times and their ability to take breaks. In practice, however, FHD will not release Contractors until the last packages are unloaded from the

²⁵ In this regard, the Regional Director described FHD's "flexing" practice, under which the Hartford Terminal manager daily adjusts the number of packages delivered by each Contractor by directing them to deliver packages outside their route. Contractors may not reject the "flexed" deliveries assigned to them. DDE, at 13.

trailers; and FHD's control over the number of packages assigned to a Contractor coupled with the requirement that packages be delivered on the day of assignment gives FHD substantial control over how many hours the Contractor will work and effectively limits the Contractor's ability to start work late in the day or to take lengthy breaks. Contractors must provide delivery service on a daily basis from Tuesday through Saturday. Packages assigned for delivery on a particular day must be delivered that same day, thereby effectively denying Contractors the ability to defer work from one day to the next.

As set forth above, FHD requires the Contractors to scan packages at the start of the workday and before delivery. As previously discussed, FHD has guidelines for safe driving, how to handle packages and when and how packages can be delivered to empty residences through the "Driver Release Program." FHD regularly monitors Contractor performance and unilaterally can decide to terminate its relationship with a Contractor if it believes the Contractor is failing to provide adequate service or to comply with FHD's guidelines, thereby giving FHD the ability to enforce its guidelines. FHD also gives bonuses tied to compliance with the guidelines, giving it a further measure of control over Contractor performance.

In spite of the weight of the contrary evidence, FHD nevertheless argues that the Regional Director erred in concluding that FHD exercises substantial control over Contractor performance. *See* Request for Review, at 14. In the instant request for review, FHD primarily concerns itself with inappropriately dissecting separate factual findings made by the Regional Director and, by doing so, ignores Board precedent that requires (in applying the common-law agency test to a determination of employee status) the Board to consider "all the incidents of the individual's relationship to the employing entity." *Slay Transportation*, 331 NLRB at 1293, *quoting in part, Roadway III, supra* at 850.

In this regard, FHD cites to various cases relating to the issue of control over the Contractors that are plainly distinguishable from the instant matter. First, as demonstrated throughout the Union's Opposition, FHD disregards the fact that it controls virtually all meaningful aspects of the Contractors' employment. Moreover, the majority of the cases cited by FHD apply the "right of control test" affirmatively abandoned by the Board in *Roadway III, supra*.²⁶ Further, FHD cites, for the most part, cases that bear no resemblance to the facts of the instant matter and assigns weight to insignificant aspects of the cited decision while ignoring all distinguishing facts.²⁷ See e.g., *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858-859 (D.C. Cir. 1995)(where the court held that owners of tractors used to haul a cartage company's trailers were independent contractors primarily because the company did not

²⁶ See, e.g. *Air Transit*, 271 N.L.R.B. 1108, 1110 (1984); *Central Transport*, 299 N.L.R.B. 5, 12 (1990); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995); *Teamsters Local 221*, 222 N.L.R.B. 423, 425 (1976) (independent contractor status found where the owner-operators were free to work according to their own schedules, and accept or reject specific work assignments); *Diamond L. Transportation*, 310 N.L.R.B. 630 (1993); *Consauga River Lumber Company v. Wade*, 221 F.2d 312, 315 (6th Cir. 1955) (applying right of control test in a non-Board action involving an automobile accident); *Associated Musicians of Greater Newark, Local #16*, 206 N.L.R.B. 581 (1973), *aff'd* 512 F.2d 991 (D.C. Cir. 1975)(unfair labor practice charge involving musicians employed by independent band leader, not venue); *Ida Cal Freight Lines*, 289 N.L.R.B. 924, 925 (1988); *Precision Bulk Transport*, 279 N.L.R.B. 437 (1986)(independent contractor status found where owner-operators were free to accept or reject assignments, determined their own work schedules, could accept or reject loads, and received no instruction as to the type of vehicle to purchase); *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (1979)(independent contractor status found where the owner-operators were free to work according to their own schedules, and accept or reject specific work assignments, owner-operators did not wear company uniforms, and owner-operator vehicles bore no company insignia); and *Young & Rubicam International, Inc.*, 226 N.L.R.B. 1271, 1272 (1976)(independent contractor status found amongst petitioning free-lance photographers who accept or reject requests to work or bid on assignments and where the photographers performed the vast majority of assignments for advertising agencies other than the company).

²⁷ For example, FHD relies on *Aurora Packing Co. v. NLRB*, 904 F.2d 72 (D.C. Cir. 1990), as standing for the proposition that FHD's determination of the business flow of packages does not make the Contractors employees. *Aurora Packing* has no relationship to the instant matter. In *Aurora Packing*, the United States Court of Appeals for the District of Columbia Circuit reversed the Board's decision that, the schoctim (rabbis who perform slaughterhouse services) in a slaughterhouse were employees under the Act. The Court reversed finding the schoctim to be independent contractors because they were appointed by a Rabbinical Council, not the Company; the schoctim were highly trained graduates of rabbinical colleges and must be certified by a supervising rabbi as competent in the intricate rules of kosher slaughtering; the schoctim's work involved elaborate skill and training; the Company had little, if any, say in the manner of the schoctim's job performance; the Company could not discharge or even question or control the interpretation of Jewish law; no work rules applied to the schoctim; and there was a critical absence of company authority or supervision. In sum, as with all of FHD's cited decisions, FHD singles out one aspect of the case and ignores all other distinguishing facts.

control the “means and manner” of their work; the company did not concern itself with the owner-operators’ hours, dress or attire, routes; type, size or color of vehicle, or vehicle maintenance); *Central Transport*, 299 N.L.R.B. 5 (1990)(where the Board found that the owners of tractors used to haul a cartage company’s trailers were independent contractors primarily because the company permitted them to work for competitor companies, were not required to wear uniforms or adhere to a dress code; there was no requirements on the type, size or color of vehicle; the Company had no training program; and owner-operators were not terminated for transgressions).

Significantly, FHD offers no more than a passing reference to distinguish *Roadway III, supra*, despite the fact that the Regional Directors in the above cited DDEs and the Board in denying FHD’s requests for review relied on the decision. Moreover, as stated above, the Board has rejected the FHD’s repeated contentions that *Argix* controls the outcome of these cases. For these reasons, the Regional Director had ample evidence demonstrating that the Contractors are employees within the Act.

(viii) *Contractors are subject to termination and discipline by FHD.*

FHD terminates Contractors for failing to provide service. Pursuant to the Operating Agreement, §9.1, FHD may terminate a Contractor without notice.²⁸ In this regard, Terminal Manager Hagar involuntarily terminated a Contractor for failing to provide service when he failed to attempt to deliver several packages (also known as a “DNA” - did not attempt). Hagar discovered the issue while reviewing “daily service reports.” The Contractor indicated that he was being given more work than he could perform. After documenting the problem,

²⁸ Under the Operating Agreement, §9.1(e), Contractors, on the other hand, must provide thirty days notice to quit. Moreover, pursuant to §1.3 of the Operating Agreement, Contractors are required to provide \$500 to a FHD “Contractor Performance Escrow Account” at the outset of their work. The escrowed amount is subject to forfeiture if the Contractor fails to provide thirty days notice of his quit and to insure the return of all FHD uniforms and equipment. Tr. 236.

FHD informed the Contractor that if the service level was not improved, he could be terminated. The Contractor was terminated in June 2006. His route was assigned to another Contractor without compensation. Tr. 427-433.

Previously, Terminal Manager Bruce Rogers (hereinafter, “Rogers”) involuntarily terminated two other Contractors. In this regard, a multiple-route Contractor was terminated when he stopped making payments on his vehicle and it was repossessed. Tr. 356-357. The Contractor had two routes. When the Contractor advised FHD of the repossession, FHD revoked both routes and terminated the Contractor despite the fact that the Contractor had rented a vehicle to service the routes. Rogers involuntarily terminated a second Contractor for “splitting stops.” A Contractor splits stops when several packages are to be delivered to one stop and instead of scanning all packages as one stop, the Contractor scans them as individual stops thereby receiving more compensation, because Contractors receive more settlement pay per stop than they receive per package. Tr. 358-359.

Furthermore, FHD’s “Safe Driver Program,” identifies 25 separate unsafe driving acts or omissions. *See* Operating Agreement, “Safe Driver Program.” Under the “Safe Driver Program”, FHD, in its sole discretion, may suspend a Contractor for 15 days for a violation. *See* DDE, at 8. Clearly, FHD has the ability to discipline contractors under the Safe Driving Program as well as through the denial of bonuses tied to service. FHD also retains the right to unilaterally control the Contractors through its ability to unilaterally discontinue the Operating Agreement.

(ix) Contractors have no substantial proprietary interest beyond their investment in their vehicles.

Even when a particular Operating Agreement contains a primary service area/proprietary zip code, FHD gives the “route” to the Contractor for free. Since April 2006,

there have been no route sales or “equity transactions” in Hartford. Tr. 397. In addition, while FHD contends that there have been two instances of a route sale by a Contractor at the Hartford Terminal since the year 2000, FHD could provide details as to only one such sale. Tr. 289-290 & 322-324.

In this regard, at some point between September 2005 and November 2005, “Dishnica”, a former employee of FedEx Ground, purchased the Wethersfield and Rocky Hill route for the sum of \$6,000 from Contractor Yacheck Chafar (“Chafar”). Tr. 999, 1002, 1005 & 1016-1017. Chafar additionally tried to sell his vehicle but Dishnica declined. Tr. 1003. Prior to the sale, Chafar informed Dishnica that when someone leaves FHD, they sell their route. Tr. 1002. Despite Chafar’s representation to Dishnica, the testimony of Contractors at the Hartford Terminal revealed that equity transactions at Hartford were/are actually non-existent due to the absence of growth potential. Tr. 226-227 & 235.

Clearly, the sale was an anomaly and, given the fact that FHD freely assigns routes to new Contractors, the purchaser in this instance had the proverbial wool pulled over his eyes.²⁹ FHD has presented no evidence that, subsequent to Dishnica’s route purchase between September and November 2005, any other Contractor has purchased a route. Indeed, testimony revealed that there is no purpose in even attempting to sell a route given that FHD provides the routes for free. In light of these facts, there is no reasonable basis for assigning a value to a route – thus precluding any future sales of routes at the Hartford Terminal.

For example, Peter Schilling (“Schilling”), a former multi-route Contractor, who operated under the name, “Meadows Delivery, LLC”, received no compensation for routes

²⁹ Dishnica paid for the route prior to applying with FHD, before discussing the matter with FHD management and prior to any training. Tr. 1019-1022.

that he abandoned.³⁰ Tr. 510 & 511. Moreover, Schilling received no profit on the sale of his vehicles and received no profit from the transfer of his business to his partner, another driver. Tr. 510, 511 & 514. During his tenure as a Contractor, spanning the Fall of 2001 to April 29, 2006, Schilling never heard of any Contractor receiving compensation for a route.³¹ Tr. 514 & 515. Schilling conceded that individuals were waiting to receive new routes and there was no point in selling. Tr. 516. Likewise, Jones, a long-term multi-route Contractor, testified that there was no growth in Hartford to warrant a route sale and that he was not aware of any Contractor purchasing a route. Tr. 226-227 & 235. Finally, since April 2006, five routes either were created or abandoned and were assigned to new Contractors without compensation. Tr. 421-422.

Against this backdrop, FHD disingenuously contends that Contractors at the Hartford terminal engage in entrepreneurial activities by purchasing and selling routes. *See Request for Review*, at 27. In this regard, as demonstrated above, there is no meaningful entrepreneurial activity at the Hartford terminal. Beside the single route sale involving Dishnica, described above, FHD purports to include David Trojanowski (“Trojanowski”) as selling his route in Hartford. That did not occur. Trojanowski never sold a route in the Hartford terminal but rather sold a route in New York prior to relocating to Hartford.

Further, the Regional Director found that,

there is insufficient evidence to establish that [the right to sell a route] provides the contractor drivers with any significant entrepreneurial opportunity. In this regard, routes covered by the Hartford Terminal are readily available directly from the Employer at no cost, or in conjunction with a vehicle sale. Moreover, contract drivers

³⁰ Schilling didn’t even attempt to sell his routes prior to leaving FHD, due to the availability of free routes and the knowledge of Contractors that when a route is abandoned, it will be freely assigned. Tr. 515-516.

³¹ Garrett Anderson, a Contractor working for FHD from 2003 to the present, similarly testified that, “I have not known of anybody to actually buy a route [at the Hartford Terminal]...” Tr. 890.

may only sell their routes to buyers who are approved by the Employer and willing to enter into the standard operating Agreement. Notably, in the seven years the Hartford Terminal has been in operation, there have been only two route sales by contract drivers. I find, as in *Roadway III*, that evidence of only a few route sales is insufficient to support the Employer's contention that the contract drivers are independent contractors.³²

Undaunted by its failure to provide sufficient evidence of route sales at the Hartford Terminal, FHD again urges the Board accept evidence of system-wide route sales to demonstrate entrepreneurial activity. *See* Request for Review, at 32. The Board has repeatedly rejected this position. In this regard, the Board in 1-RC-21966, held that,

Even assuming that this additional evidence of route sales had been admitted into evidence, we do not find that the economic value of the route sales in those facilities to have bearing on the value of route sales in the instant case. In both the Region 22 and Region 4 cases, the Regional Directors limited their consideration of evidence of the route sales and entrepreneurial opportunity to the facilities at issue and rejected the Employer's argument that system-wide testimony about route sales and other entrepreneurial activity at FedEx terminals nationwide should have been admitted, and the Board denied the requests for review. In the instant case, the Regional Director similarly limited her consideration of evidence to route sales to the Worcester facility, finding that "the evidence suggests that the right to sell a route may be completely illusory, since there is no evidence that any contractor in the Worcester terminal has ever bought or sold a route." We again deny the Employer's request for review of the issue.

In sum, the Board has, on more than one occasion, considered and rejected FHD's argument on this issue and there is no reason to depart from the ruling.

(x) Contractors have little entrepreneurial opportunity for gain or loss.

FHD unilaterally sets the rates and the manner in which Contractors will be compensated and effectively determines how much Contractors can earn by deciding the number of deliveries they will be assigned. *See* Operating Agreement, Addendum 3; DDE, at 16-17. FHD makes core zone density and vehicle availability payments that help insulate

³² Indeed, the Regional Director noted that, "the record discloses that the overwhelming majority of the contract drivers currently assigned to the Hartford Terminal acquired their routes from [FHD] or from a previous contract driver at no cost for the route itself." DDE, at 10.

Contractors from fluctuations in income due to reductions in the number of deliveries. *See* Operating Agreement, Addendum 3. Although piece rate payments for package deliveries provide Contractors with a substantial portion of their income, Contractors derive significant portions of their income from guaranteed core zone and vehicle availability payments. For example, Employer's Exhibits 14 and 16 demonstrate that the core zone settlement and vehicle settlements on the Manchester and Litchfield County routes each total \$355. As compared with the total settlements for those routes (Employer Exhibits 13 & 17), the core zone settlement and vehicle settlements result in 30% of the settlements on each route.

FHD also minimizes the Contractors' risk by giving them gas subsidies as the price of gas rises. *See* Operating Agreement, Addendum 3. In addition, while Contractors may be able to save money by deciding where to buy gas, when and where to make vehicle repairs, or how to drive their routes, these savings cannot substantially alter their earnings. Moreover, only two Contractors currently operate multiple routes at the Hartford Terminal.

Indeed, the Regional Director found that, FHD "unilaterally determines the rates of compensation" and pays contract drivers with a weekly 'settlement check' that is based, *inter alia*, on the number of packages delivered, the number of stops made, and the distance traveled" and also bonuses, including \$750 quarterly bonuses, bonuses for making deliveries during the "peak season," quarterly service bonus based on years of service, \$120 bonus for meeting certain goals for the accounting period regarding scanning accuracy, absence of at-fault accidents or verified customer complaints. DDE, at 16.

In *Slay Transportation, supra*, the Board stated the following regarding entrepreneurial opportunity:

The Employer's owner-operators do not have a significant entrepreneurial opportunity for financial gain or loss. The Employer establishes and controls the rate of

compensation, which is based on the rates applicable to company drivers as set forth in the master agreement between the Employer and the Union, as well as the rates the Employer charges to its customers. Such a compensation arrangement leaves little room for the owner-operators to increase their income through their own efforts or ingenuity. Thus, as noted, there is no evidence that any of them use multiple trucks or that they negotiate special deals with the Employer. Further, despite the fact that an owner-operator may hire a driver to operate the tractor he leases to the Employer, the owner-operator can only negotiate that driver's wages within the compensation rate set by the Employer. *See Roadway, supra*; *R. W. Bozel Transfer, Inc.*, 304 NLRB 200 (1991). ...

This lack of pursuit of outside business activity may be less a reflection of entrepreneurial choice by the Employer's owner-operators and more a matter of the obstacles created by their relationship with the Employer, *See Roadway, supra*; *C.C. Eastern v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995), *denying enf. and vacating* 313 NLRB 632 (1994), where the court agreed with the principle that "if a company offers his workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors." 331 NLRB at 1294.

For the reasons discussed above, Contractors at Hartford similarly lack entrepreneurial opportunity.

B. Contractor Paul Chiappa Is Neither A Supervisory Employee Nor A Multi-route Contractor.

FHD argues that the Regional Director erred in determining that Paul Chiappa ("Chiappa") is not a supervisor and that the Regional Director avoided FHD's argument that Chiappa should be excluded as a multiple route contractor. First, in its Post-Hearing Brief, FHD barely touched on the subject of whether Chiappa was a multiple route contractor, but rather, directed its complaints about the conduct of hearing. *See FHD Post-Hearing Brief*, at 28. Instead, FHD focused on whether Chiappa was a statutory supervisor. *See FHD Post-Hearing Brief*, at 32. Second, the issue Chiappa's so-called supervision of Robert Dizinno ("Dizinno") is intertwined with the issue of whether Chiappa was a multi-route contractor. The Regional Director addressed both issues. *See DDE*, at 30-32.

It is undisputed that in April 2003, Chiappa began working as a Contractor for FHD after attending FHD driver training and passing FHD's employer and criminal background check, motor vehicle record check, and physical and drug test. Tr. 668-675. Chiappa was then assigned the Litchfield County, Connecticut route as a temporary driver and later as a Contractor. Tr. 675 & 1089.

In the Summer of 2004, Dizinno, following FHD driver training, sought to become a Contractor, but due to credit problems was unable to finance a vehicle for deliveries. Tr. 1053 & 1085. Following training, he served as a temporary employee of FHD working through Addeco Services, a temp agency. Tr. 1090. During this period of time, FHD Terminal Manager Rogers came to Dizinno and asked him to take over the open Manchester route. Tr. 824, 1058 & 1087-1088. Dizinno, Rogers and Chiappa discussed Dizinno taking Chiappa's truck to service the Manchester route. Tr. 824 & 1088. Rogers informed Dizinno and Chiappa that, in order to do so, a Limited Liability Company ("LLC") would have to be formed, Chiappa would need to acquire the Manchester route as a second route and that Dizinno would service the route and operate under the LLC.³³ Tr. 709-710 & 729.

In response, Chiappa informed Rogers that he did not want anything to do with a second route. Tr. 712 & 825-826. He further informed Rogers that he did not want to supervise anyone and that the issue of supervision would be between Rogers and Dizinno. Tr. 712. Rogers agreed. Tr. 712 & 825-826. Rogers also agreed that Dizinno would earn all of the money associated with the Manchester route. Tr. 826. Rogers, who testified at the hearing in this matter, did not contradict the agreement set forth above.

³³ At the time, FHD was pushing everyone to form an LLC. Tr. 1087.

As a result of these discussions, Chiappa and Dizinno co-founded “Scoville Hill Associates, L.L.C.” (“Scoville Hill”) in August 2004. Tr. 682 & 1074. The Articles of Organization for Scoville Hill were filed with the Connecticut Secretary of State on August 16, 2004. *See* Employer Exhibit 10.³⁴ Under the Articles of Organization, Chiappa and Dizinno were member managers of Scoville Hill. Tr. 800 & 1075.

Chiappa notified FHD of the incorporation of Scoville Hill.³⁵ Tr. 828. Significantly, on November 23, 2004, Terminal Manager Rogers prepared and executed a “SIGNATURE PAGE AMENDMENT” to the “CONTRACTOR OPERATING AGREEMENT,” noting that as of the above date,

(THE AGREEMENT) BY AND BETWEEN Paul Chiappa (CONTRACTOR) AND FEDEX ... IS AMENDED AS A RESULT OF THE CHANGE OF CONTRACTOR’S IDENTITY FROM Paul Chiappa, A SOLE PROPRIETOR, TO Scoville Hill Assoc. AN INCORPORATED ENTITY EFFECTIVE 8/20/2004.

See Employer Exhibit 23; Tr. 831. Chiappa signed the amendment as Managing Member for Scoville Hill. Tr. 831 & 1199. Following the incorporation of Scoville Hill, FHD issued separate settlement statements, settlement checks and 1099 forms to Scoville Hill for each route. *See* Employer Exhibits 1, 2, 13, 14, 16 & 17; Tr. 728 & 1076. FHD additionally makes direct deposits to the Scoville Hill checking account.³⁶ Furthermore, FHD Terminal Manager Hagar testified that the Manchester and Litchfield routes are in the name of Scoville Hill. Tr. 386. Based on these facts, it is clear that Dizinno and Chiappa are engaged in a partnership that owns the Manchester and Litchfield County routes. Tr. 711-712, 808, 1068, 1074, 1075,

³⁴ A copy of the Articles of Organization was provided to FHD. Tr. 1075.

³⁵ Following Chiappa’s notification to FHD concerning the creation of Scoville Hill, FHD (without a request from Chiappa), began issuing all settlement payments in the name of Scoville Hill. Tr. 828.

³⁶ Scoville Hill, following receipt of the weekly settlement statement and direct deposit for both routes, pays Mohawk Transportation, LLC, a corporation created by Dizinno, all amounts relating to the Manchester route. Scoville Hill issues a 1099 form to Mohawk Transportation. Tr. 1052 & 1075-1076.

1084 & 1089. Based on these undisputed facts, it is clear that Chiappa is not a multiple-route contractor.

Like the incorporation of Scoville Hill, virtually the same scenario involved former Contractor Schilling. In this regard, Schilling incorporated and served as manager for “Meadows Delivery, LLC” (“Meadows Delivery”). Tr. 447. He subsequently brought on two non-Contractor partners that went through the FHD qualification/application process and training described above. Tr. 286 & 485. Schilling ultimately left the partnership and transferred his interests to the two remaining drivers (one of whom later abandoned the partnership). Tr. 498, 510, 511 & 513. When the transfer of the business occurred, the remaining driver, Melvis McMillan (“McMillan”), did not sign an Operating Agreement. Tr. 286. FHD’s Operating Agreement is with Meadows Delivery. Tr. 387. According to Durette, FHD’s Contractor Relations Manager for the Northeast, the Operating Agreement transferred to Meadows Delivery, and McMillan’s obligations under the Operating Agreement flow through Meadows Delivery. Tr. 286-287. Importantly, Durrett testified that the terms of the Operating Agreement do not change regardless of whether the Contractor is an individual or a corporation. Tr. 280-281. Clearly, either an individual or the managing members of a corporation may serve as FHD Contractors.

As with Meadows Delivery, Dizinno and Chiappa operate as partners under Scoville Hill. Chiappa’s prior Operating Agreement was transferred to Scoville Hill by FHD. *See* Employer Exhibit 23. Like McMillan, Dizinno was trained and qualified to drive for FHD. As such, as a partner in Scoville Hill, Dizinno’s route obligations under the Scoville Hill Operating Agreement flow through Scoville Hill. In sum, it is clear that Chiappa and Dizinno are partners in a corporation that owns the two routes.

Furthermore, Chiappa is not a supervisor over Dizinno under the undisputed facts presented to the Regional Director. Pursuant to Section 2(11) of the Act, the term “supervisor” means

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

See 29 U.S.C. §152(11); *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). Isolated or sporadic exercise of authority is insufficient to establish supervisory status. *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997), citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001). Chiappa is not Dizinno’s supervisor under the Act.

In accordance with the agreement with Rogers, Chiappa never supervised or directed Dizinno’s duties or functions at FHD. Tr. 829 & 1083-1084. Further, FHD presented no evidence that Dizinno has ever been supervised by Chiappa. Significantly, Dizinno has continuously operated the Manchester route, since November 2004, and Chiappa performs no services on the route. Tr. 1077 & 1084. Chiappa’s total time on the Manchester route since November 2004 consisted of one hour when Dizinno injured his shoulder. Tr. 1084-1085.

Contrary to its representations to the Board, FHD, however, provides direct supervision to Dizinno as it does with all Contractors. In this regard, FHD conducts all discussions concerning the Manchester route with Dizinno directly and has never come to Chiappa concerning issues related to the Manchester route. Tr. 829-830. Dizinno discusses all customer complaints directly with FHD. Tr. 1080-1082. For example, FHD performs

“Service Audits” or “Ride-alongs” with Dizinno. Tr. 1077-1079. Any issues arising from the audits are discussed with Dizinno. Tr. 1077-1079. Further demonstrating the fact that Chiappa is a non-supervisory employee is the fact that when a temporary driver has been hired during the peak season, the Terminal Manager has handed Dizinno the settlement sheets for Scoville Hill in order for Dizinno to review the amounts he was owed compared to the amount owed to the temporary driver on the Manchester route. Tr. 1105.

As a result of the agreement with FHD and the formation of Scoville Hill, Dizinno took responsibility for all of the expenses associated with the vehicle including fuel and vehicle repair expenses. Tr. 826, 1066, 1071 & 1089. Dizinno receives all of the settlement payments earned on the Manchester route.³⁷ Tr. 755, 826-827 & 1084. Dizinno further makes the monthly payment on Chiappa’s P-550 that is operated on the Manchester route.³⁸ Tr. 1040-1041 & 1066. In addition, the cost of insurance provided through FHD’s related insurer, Protective Insurance, and the cost of the Business Support Package are deducted from the settlement for the Manchester route. Tr. 1070 & 1076. Scoville Hill also receives an additional settlement of \$750 from FHD, paid quarterly, as the result of the corporation operating more than one route. Tr. 812 & 1090. The additional settlement is shared between Chiappa and Dizinno. Tr. 1090. Contractor Customer Service bonuses (also known as a “CCS” bonus) are also issued to Scoville Hill by FHD each month. Tr. 795-796 & 1082-1083. Chiappa and Dizinno share the CCS bonuses. Tr. 796.

Further, until February 27, 2007 (the second day of the hearing in this matter), Dizinno had been issued a FHD Contractor mailbox. Until then, Dizinno had a keyed mailbox in his

³⁷ Chiappa does not review the settlement statements or settlement checks for the Manchester route because it is not his route. Tr. 754-755 & 763.

³⁸ While the P-550 van is financed in Chiappa’s name, all monthly payments are made to Chiappa by Dizinno.

name at the Hartford Terminal where he received ongoing communications directly from FHD such as customer complaints, daily summaries (showing the number of stops performed and number of packages delivered), FHD newsletters, notices relating to changes and official requests to see FHD management.³⁹ Tr. 1091, 1094 & 1106. On February 27th, Dizinno's name was removed from his mailbox by FHD. Tr. 1091. All of the paperwork pertaining to Dizinno's Manchester route had been shoved into Chiappa's mailbox. Tr. 1091-1092. Lenny Marchese, FHD's Service Manager, subsequently asked Dizinno for the key to his mailbox and when Dizinno asked why the box had been taken, Marchese shook his head and walked away. Tr. 1092. When Terminal Manager Hagar was questioned as to the reasons for the change he testified that had no knowledge as to why the mailbox was removed. Tr. 426. Hagar, however, did concede that Contractors' names are placed on the mailboxes in order for FHD to communicate with them. Tr. 424. The removal of Dizinno's mailbox was a transparent attempt by FHD to show that Dizinno is supervised by Chiappa rather than FHD.

In this regard, contrary to FHD's argument, the Regional Director fully considered and explained the circumstances under which Chiappa and Robert Dizzino (hereinafter, "Dizzino") formed a partnership, at FHD's request, that held two routes.⁴⁰ *See* DDE, at 21-23.

³⁹ Chaippa also had a separate mailbox bearing his name. Tr. 1091. On February 28, 2007, Chaippa's mailbox was renamed "Scoville Hill Associates, LLC." Tr. 1092.

⁴⁰ FHD also complains that the Regional Director did not grant its request to present additional evidence and did not overturn the Hearing Officer's evidentiary rulings on the Chiappa/Dizinno relationship. *See* Request for Review, at 34n.10. FHD presents only part of the facts. First, both Chiappa and Dizinno were FHD's witnesses. In this regard, both Chiappa and Dizinno were examined, at length, concerning their relationship. Tr. 664-821, 831-834, 1038-1074, 1094-1103 & 1108-1111. Importantly, counsel for FHD extensively covered Chiappa's tax record - Schedule C (Profit or Loss from Business Form), a document not prepared by Chiappa. *See* Tr. 664, 694-706, 715-727, 731-734, 742-745, 748-749, 770-771, 778, 797-799 & 808-810. The document only shows profits and losses. During the hearing, it was evident that FHD's counsel was simply attempting to harass Chiappa by his repetitive questioning. The document had no bearing on FHD's assertion that Chiappa was a supervisor as found by the Regional Director. As such, the exclusion of Chiappa's IRS Schedule C was appropriate. In addition, FHD did not introduce tax records of a witness favorable to it, Jones, based on privacy grounds.

The Regional Director also found that “the Employer treats Dizinno as a contract driver and not as Chiappa’s employee.” DDE, at 31. Under these circumstances, Chiappa cannot be considered a multiple-route contractor as he does not operate multiple routes. Indeed, the Regional Director noted that “the Employer treats Dizinno as a contract driver in his own right”, that “unlike its treatment of other drivers hired by and working for contract drivers, the Employer conducts all discussions regarding the Manchester Route directly with Dizinno, not Chiappa”, and like contract drivers, Dizzino was provided a mailbox. DDE, at 23. In sum, based on the agreement with FHD and the creation of the partnership between Chiappa and Dizinno, it is clear that Chiappa was neither a multiple route contractor nor a supervisory employee.⁴¹

C. Dizinno Is FHD’s Employee.

FHD next contends that, even “[i]f the Board upholds the Regional Director’s erroneous finding that Dizinno is an employee, he must be excluded from the unit because he is an employee of Chiappa, and his inclusion in the unit must be predicated upon record evidence establishing joint employer status and consent by both employers.” FHD’s assertion is misguided. “A joint employer, under the Board’s traditional definition, is comprised of two or more employers ... that ‘share or codetermine those matters governing essential terms and conditions of employment.’” *Oakwood Care Center*, 343 N.L.R.B. 659, 662 (2004).

⁴¹ FHD further complains that the Hearing Officer made an inappropriate statement to Chiappa. *See* Request for Review, at 34n.10. In fact, no inappropriate statement was shown to exist. Neither Chiappa, the Hearing Officer nor FHD’s other witness who was present corroborated FHD’s Regional Safety and Maintenance Director Michael Carey’s (“Carey”) allegation of impropriety. Significantly, directly before Carey allegedly overheard the so-called inappropriate remark, counsel for FHD had threatened to have the Hearing Officer removed. Tr. 779. Further, contrary to FHD’s argument, the Hearing Officer did not admit to making inappropriate comments to Chiappa. Nevertheless, the Regional Director, based on the allegation, assigned another Hearing Officer to serve during Carey’s testimony. In addition, FHD suffered no prejudice. As noted by the Regional Director, the Hearing Officer does not make credibility determinations or make findings or recommendations as to the merits of the issues. DDE, at 2.

In addition to the facts set forth above, it is clear that only FHD employs Dizinno. In this regard, Dizinno works out of the Hartford Terminal as do all other Contractors. Dizinno has continuously operated the Manchester route from November 2004 through the present, delivering packages for FHD. Like all other Contractors, Dizinno's work hours start when he arrives at the Hartford Terminal between 6:00 a.m. and 6:30 a.m. He leaves the terminal at approximately 8:00 a.m. to service the Manchester route. He has as many as 100 to 160 stops a day. Tr. 1093.

Since November 2004, Dizinno has received all of the settlement payments earned on the Manchester route (Tr. 755, 826-827 & 1084) and has been responsible for all of the expenses associated with his route vehicle and the Manchester route, including fuel and vehicle repair expenses. Tr. 826, 1066, 1071 & 1089. Dizinno further makes monthly payments on the P-550 vehicle operated on the Manchester route.⁴² Tr. 1040-1041 & 1066.

As noted above, Dizinno went through the application process with FHD and was interviewed. He then went through driver training by FHD management at the Hartford Terminal. FHD, additionally, subjected Dizinno to a physical and drug screen and issued him a driver certification card. Tr. 1090. Clearly, Dizinno qualified to drive for FHD. Tr. 824. Following FHD training, Dizinno worked as a FHD temporary driver like most other Contractors. Tr. 1056-1057 & 1085-1086. Like all other Contractors, Dizinno (albeit through his company, Scoville Hill), receives a settlement statement and a settlement check for the Manchester route with all deductions for FHD insurance through Protective Insurance and the

⁴² FHD also claims that Dizinno admitted that he would have to find another job if Chiappa sold the Manchester route vehicle. Dizinno did not testify to that affect. To the contrary, Dizinno, when hypothetically asked "What would happen if Mr. Chiappa decided to sell the P-550?", answered "I would say sell it to me. This is ridiculous." Tr. 1067-1068. As stated, Dizinno made all the payments on the vehicle. Dizinno also testified that any actions related to the sale of any partnership holdings by Chiappa would result in a "legal problem." Tr. 1109-1110.

FHD Business Support Package. Tr. 1070 & 1076. Additional compensation is received by Dizinno through an additional settlement of \$750, paid quarterly, and CCS bonuses on the Manchester route each month. Dizinno has also utilized the “Service Maintenance Fund” maintained by FHD for repairs on the Manchester route vehicle. Tr. 760-761.

As with all other Contractors, Dizinno is subjected to FHD Customer Service Rides and FHD Driver Release Audits. Tr. 1077-1079. Any issues arising from the rides are discussed directly between FHD management and Dizinno. Tr. 1077-1079. Significantly, FHD directs all discussions concerning the Manchester route to Dizinno, not Chiappa. Tr. 829-830. Customer complaints are also discussed directly between Dizinno and FHD management. Tr. 1080-1082.

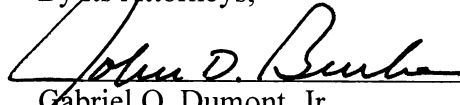
In this regard, the Regional Director found that FHD treats Dizinno as a contract driver and supervised Dizinno. DDE, at 31. There is not one scintilla of record evidence that Chiappa ever served as Dizinno’s employer. Thus, there is no joint employer issue because Dizinno’s sole employer has always been FHD.⁴³

CONCLUSION

For all the reasons set out above, Petitioner, Teamsters Union Local 671, a/w International Brotherhood of Teamsters, respectfully requests that the Board deny FHD’s Request for Review.

⁴³ FHD has abandoned any argument that Dizinno does not share a “community of interests” with the other Contractors. *See* Petitioner’s Post-Hearing Memorandum, Part C, at 34. Similarly, FHD has abandoned any argument that Garrett Anderson is a “supervisor” or multiple route contractor. *See* Petitioner’s Post-Hearing Memorandum, Part D, at 36. As such, Local 671 has not addressed either claim.

For the Petitioner,
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May 3, 2007

CERTIFICATE OF SERVICE

I, John D. Burke, attorney for the Petitioner, International Brotherhood of Teamsters, Local Union No. 671, hereby certify that on May 3, 2007, this Opposition to Fedex Home Delivery's Request for Review was electronically filed with the Executive Secretary of the National Labor Relations Board, and that I mailed the required number of copies to the Executive Secretary of the National Labor Relations Board and the following parties via Overnight Mail:

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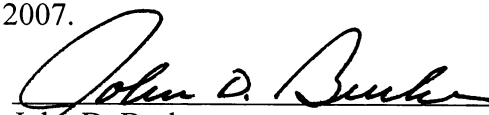
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